

STATE OF MICHIGAN
COURT OF APPEALS

PROVIDIAN NATIONAL BANK, f/k/a FIRST
DEPOSIT NATIONAL BANK, and ROBERT
KIRK, Personal Representative of the Estate of
PASQUALE BOMMARITO, Deceased,

Plaintiffs-Appellants,

v

KIRSTEN BOMMARITO,

Defendant-Appellee.

UNPUBLISHED

April 19, 2002

No. 225697

Macomb Probate Court

LC No. 99-161813-CZ

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order denying their motion for summary disposition and granting summary disposition in favor of defendant in this action involving an alleged fraudulent conveyance of real estate. We affirm the denial of plaintiff's motion for summary disposition, reverse the grant of summary disposition in favor of defendant, and remand for further proceedings.

In June 1995, plaintiff Providian National Bank obtained a judgment in the amount of \$11,500 against Pasquale Bommarito in the Macomb Circuit Court. In June 1997, he died without satisfying the judgment. In April 1999, the Macomb Probate Court opened a decedent's estate for Mr. Bommarito on Providian's petition as a creditor of his estate. One month later, plaintiffs filed suit against defendant, Mr. Bommarito's former wife, to obtain payment on the 1995 judgment. Plaintiffs claimed that Mr. Bommarito fraudulently conveyed his interest in the martial home to defendant in December 1995. Plaintiffs alleged that he sold his interest in the property for \$50,000, but that his interest was actually worth \$75,000. Plaintiffs presented evidence that defendant sold the property in July 1996 for \$149,500. Consequently, plaintiffs seek a judgment setting aside the conveyance or to recover damages.

Shortly after filing this suit, plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (10). Defendant countered by responding that summary disposition should be denied because she had raised valid defenses (that the property was transferred for fair market value and that Mr. Bommarito was solvent at the time of the transfer) and that there were questions of fact that had to be resolved. The trial court ruled that the assessed value of the land at the time of the transfer between the Bommaritos was \$23,500, and, thus, had a fair market

value of \$47,000. The trial court further ruled that there was no evidence that Mr. Bommarito intended to defraud his creditor. The trial court denied plaintiffs' motion for summary disposition and granted summary disposition in favor of defendant. Plaintiffs moved for rehearing, but the trial court again ruled that there was no evidence of fraud. Plaintiffs appeal from these rulings.

This Court reviews de novo a decision on a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers the affidavits, pleadings, admissions, depositions, and other documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Smith, supra* at 454, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The court may grant summary disposition if the evidence shows that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* Conversely, if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

Plaintiffs allege that the decedent's sale of real estate to defendant, his ex-wife, constituted a fraudulent conveyance under MCL 566.34 and MCL 566.35, or alternatively, MCL 700.617. Both MCL 566.34 and MCL 700.617 require a showing that the decedent conveyed the property with the intent to defraud his creditors. MCL 566.34 identifies several factors to be considered in making this determination.

- (a) The transfer or obligation was to an insider.
- (b) The debtor retained possession or control of the property transferred after the transfer.
- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all of the debtor's assets.
- (f) The debtor absconded.
- (g) The debtor removed or concealed assets.
- (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to lienor who transferred the assets to an insider of the debtor.

Of the factors identified by plaintiff, we believe that only § 4(2)(d) has been clearly demonstrated by the submitted evidence, inasmuch as it is undisputed that the decedent was sued by Providian, which recovered a judgment against the decedent. Contrary to what plaintiffs argue, however, defendant was not an “insider” as that term is defined in MCL 566.31.¹ Therefore, factor (a) does not favor plaintiffs’ position.

With regard to factors (e), (h) and (i), the submitted evidences establishes the existence of genuine issues of material fact regarding the applicability of these factors. Specifically, the submitted evidence does not demonstrate whether or not the decedent’s conveyance of the real estate involved substantially all of the decedent’s assets (factor e). Further, the evidence did not demonstrate the absence of a genuine issue of material fact on the issue of decedent’s solvency (factor i). Although a debtor is considered insolvent under MCL 566.32 if the sum of the debtor’s debts is greater than all of the debtor’s assets at a fair valuation, here there was no direct evidence concerning the decedent’s debts and assets. Plaintiffs correctly observe that, under MCL 566.32, a debtor who is generally not paying his debts as they become due is presumed to be insolvent. Although it is undisputed that the decedent here failed to pay the outstanding judgment to Providian, there was no other evidence concerning the decedent’s other debts and whether he was timely paying them. The indirect evidence presented in connection with this issue does not definitively address the issue of the decedent’s insolvency. There was also conflicting evidence regarding factor (h), i.e., the value of the property conveyed to defendant. The evidence indicated that the state equalized value (SEV) of the property in 1995 was \$23,500, that the decedent sold his one-half interest in the property to defendant in 1995 for \$50,000, that the decedent received an offer of \$107,250 for the property shortly before selling his interest to defendant, and that defendant subsequently sold the property in 1996 for \$149,500. This evidence established the existence of a genuine issue of material fact regarding the value of the property.

In order to prevail under MCL 566.34(1)(b), plaintiffs were required to demonstrate that the decedent failed to receive a reasonably equivalent value in exchange for the property, and that, either (1) he was engaged or about to engage in a business or transaction for which his remaining assets were unreasonably small in relation to the business, or (2) he intended to incur, or believed he would incur, debts beyond his ability to pay as they became due. Here, plaintiffs claim that subsection (2) applies. However, because the submitted evidence failed to establish the decedent’s intent at the time the property was transferred, and because there was a genuine issue of fact concerning the value of the property, summary disposition was inappropriate.

Plaintiffs likewise were not entitled to summary disposition on the basis of MCL 566.35. That provision also requires evidence that the decedent made the transfer without receiving a reasonably equivalent value in exchange for it, *and* that he was insolvent at the time, or rendered

¹ Where the debtor is an individual, the statute defines insider as: (1) a relative of the debtor or of a general partner of the debtor; (2) a partnership in which the debtor is a general partner; (3) a general partner in a partnership in which the debtor is a general partner; or (4) a corporation of which the debtor is a director, officer, or person in control.

insolvent as a result of it. Again, because there were factual issues concerning the value of the property and the decedent's solvency, summary disposition in plaintiffs' favor was not warranted.

While the trial court properly denied plaintiffs' motion for summary disposition, it erred in granting summary disposition in favor of defendant. In this regard, we agree with plaintiffs that the trial court engaged in improper fact finding when deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) (The court is not permitted to assess credibility or to determine facts on a motion for summary judgment). Instead, the trial court should have limited its analysis to deciding whether the submitted evidence established the absence of a genuine issue with respect to a material fact. Here, the trial court essentially conceded that neither party was successful in establishing the absence of a genuine issue of material fact when it stated in its opinion, "Neither parties (sic) involved really supplied the court with suitable and sound evidence as to the true value of the parcel of land . . . nor has extensive investigation been carried out as to the income and financial situation of the deceased." Thus, summary disposition was improperly granted to defendant.

In sum, while we affirm the trial court's denial of plaintiffs' motion for summary disposition, we reverse the grant of summary disposition in favor of defendant and remand for further proceedings. There are factual issues that must be resolved by a trier of fact.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin